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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 John Kristoffer Larsgard,

10 Plaintiff,

11 v.

12 David Straub, et al.,

13 Defendants.
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No. CV-13-00638-TUC-DCB

ORDER

15 The Court denied the Plaintiff's motions for telephonic appearance at trial of
16 witnesses Sharron Dowdle and Criss Candelaria. Both were ordered to appear in person at
17 the trial. Plaintiff was also granted leave to obtain their deposition testimony by telephone,
18 video conference or in person. Plaintiff has now scheduled depositions for both witnesses
19 for Thursday and Friday (2/18/19 and 3/1/19). Defendants filed a Motion for Protective
20 Order (Doc. 198), arguing that they should not have to "defend" these depositions until the
21 Court rules on the Motion in Limine Re: Attorney-Client Privilege. (Doc. 175.)
22 Defendants assert that the attorney-client privilege has been waived with respect to all of
23 Plaintiff's communications with his criminal defense attorneys. For reasons explained
24 below, the Court grants in part and denies in part the Defendants' Motion in Limine Re:
25 Attorney Client Privilege. The Motion for a Protective Order is moot.

26 While Defendants ask the Court to preclude all evidence relating to the criminal
27 case, *see* (Motion in Limine Re: References to Other Cases (Criminal Case) (Doc. 174),
28 they also ask the Court to find that the Plaintiff has waived the attorney-client privilege

1 with respect to these criminal matters, including: “all relevant matters arising out of
2 counsel’s representation of Plaintiff, without limitation; their relevant communications, all
3 issues arising out of and relating to those communications; procedures used for attorney-
4 client communications with incarcerated defendants, [counsel’s] relationship with
5 Plaintiff, and the status of Plaintiff’s appeal.” (Motion (Doc. 175) at 1-2.)

6 Seemingly in conflict with his Response to the Motion in Limine Re: References to
7 Other Cases (Criminal Case), wherein the Plaintiff argued that he should be allowed to
8 discuss how he lost the chance to provide his lawyer with issues and facts that may have
9 assisted his attorney in preparing his appeal, the Plaintiff argues in respect to the question
10 of attorney-client privilege that “the only issue is whether or not Plaintiff was denied access
11 to counsel by Defendants. (Response (Doc. 185) at 2.) Plaintiff submits that Defendants
12 can “cross-examine Mr. Candelaria regarding his attempts to reach Plaintiff without
13 discussing attorney-client privilege communications. The communications between
14 Plaintiff and Mr. Candelaria and his support staff are not relevant to Plaintiff’s Sixth
15 Amendment claim and should not be discussed at trial.”

16 Neither side sets out the law related to waiver. As an initial matter, “the identity of
17 the client, the amount of the fee, the identification of payment by case file name, and the
18 general purpose of the work performed are usually not protected from disclosure by the
19 attorney-client privilege.” *United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999)
20 (citing *Clarke v. American Commerce Nat’l Bank*, 974 F.2d 127, 129 (9th Cir.1992)).
21 Given the broad scope of the waiver suggested by Defendants, there is an intrusion on the
22 privilege if Defendants ask witnesses about the substance of attorney-client conversations
23 concerning appeal strategies and legal and factual issues related to the appeal. Even the
24 requested billing records are subject to the privilege to the extent that they represent
25 “correspondence, bills, ledgers, statements, and time records which also reveal the motive
26 of the client in seeking representation, litigation strategy, or the specific nature of the
27 services provided, such as researching particular areas of law.” *Id.* (quoting *Clarke*, 974
28 F.2d at 129).

1 To determine whether Larsgard has waived the attorney-client privilege by claiming
2 that he was denied access to appellate counsel, the Court employs a three-pronged test: 1)
3 is the party asserting the privilege as a result of some affirmative act, such as filing suit; 2)
4 whether through this affirmative act, the asserting party has put the privileged information
5 at issue, and 3) whether allowing the privilege denies the opponent access to information
6 vital to its defense. *Id.* at 1195 (citations omitted). The burden to prove the privilege is
7 carried by the party asserting it. *Lambright v. Ryan*, 698 F.3d 808, 822 (9th Cir. 2012).

8 Here, the Plaintiff raised the issue of access to counsel in his Sixth Amendment
9 claim. By this claim, he put the communications between him and Candelaria in issue
10 insofar as they related to Larsgard's appeal. He has waived his attorney-client privilege
11 over these communications, including whether the nature of Plaintiff's calls to Candelaria
12 were always about his criminal case. If Larsgard intends to submit evidence of specific
13 facts and issues he was unable to discuss with Candelaria, then in rebuttal the Defendants
14 must know whether such facts and issues had previously been discussed and why or why
15 not those facts and issues had not been included in the Opening Brief. The Opening Brief
16 was filed November 9, 2012, before Larsgard was moved to the Rincon Mental Health
17 Unit. The Answer was filed on January 18, 2019. The Reply Brief was admittedly filed
18 without input from Larsgard on February 7, 2019, the day after he left the hospital. To the
19 extent, the Plaintiff wants to invoke the privilege during Candelaria's deposition to
20 preclude the Defendants from obtaining rebuttal evidence, he does so at his own risk of
21 being precluded at trial from introducing evidence of facts and issues he may have chosen
22 to communicate to his attorneys if he had had access to them. Larsgard may not use the
23 attorney-client privilege as both a shield and a sword.

24 Defendants do not object to Plaintiff's use of Sharon Dowdle's deposition at trial
25 because she resides in Texas, but do object to using deposition testimony from Candelaria
26 because he resides in Pinetop Arizona. Defendants argue that Candelaria should testify in
27 person at the trial because he is a key witness in the case. He is the only source other than
28 the Plaintiff who can testify to the nature of the attorney-client communications necessary

1 during the pendency of a direct appeal. He is the only witness who can describe the ADC
2 procedures for lawyer access from the perspective of a criminal defense attorney who wants
3 to communicate with an inmate client. Plaintiff is free to determine whether he wants to
4 offer deposition testimony in the case in chief, but the Court will not allow deposition
5 testimony to be presented which has not been subjected to cross-examination. As noted
6 above, the Plaintiff invokes the privilege at Candelaria's deposition at the risk of having
7 testimony precluded at trial.

8 The Court finds that the attorney-client privilege is waived as related to
9 communications or lack of communications between Larsgard and counsel related to the
10 direct appeal. To be clear, the Court does not intend to retry Larsgard's criminal case, and
11 whether the attorney-client privilege is waived will not govern the Court's determination
12 regarding admissibility of evidence based on relevancy. The Court has not yet ruled on the
13 Motion in Limine Re: References to Other Cases (Criminal Case). Assuming some
14 allowance, Plaintiff should take care not to open the door to attorney-client
15 communications that remain protected. Heretofore, Plaintiff has not been forthcoming with
16 evidence of actual injury; such evidence is not required in this civil case. (Order (Doc.
17 191) (referencing Court's prior rulings rejecting Defendants' assertion that actual injury is
18 element of claim). To be clear, specific examples of facts and issues that may have assisted
19 his attorney in preparing the appeal will be precluded at trial unless Defendants have been
20 afforded discovery. The only remaining discovery is Candelaria's deposition.

21 **Accordingly,**

22 **IT IS ORDERED** that the Motion in Limine Re: Attorney-Client Privilege (Doc.
23 175) is GRANTED IN PART AND DENIED IN PART as explained above.

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1 **IT IS FURTHER ORDERED** that the Motion for Protective Order (Doc. 198) is
2 DENIED AS MOOT.

3 Dated this 25th day of February, 2019.

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A handwritten signature in black ink, appearing to read "David C. Bury", is written over a horizontal line.

Honorable David C. Bury
United States District Judge